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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re A.G. et al., Persons Coming Under  
the Juvenile Court Law.

B206645  
(Los Angeles County  
Super. Ct. No. CK70749)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

JESUS G.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County.  
D. Zeke Zeidler, Juvenile Court Referee. Affirmed in part and reversed in  
part.

Harry Zimmerman for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant  
County Counsel, Kirsten J. Andreasen, Senior Associate County Counsel for  
Plaintiff and Respondent.

## FACTUAL AND PROCEDURAL BACKGROUND

Appellant Jesus G. (Jesus) is the father of A.G. (A.), a seven year old boy.<sup>1</sup> Since 2000, Jesus has been co-habiting with Lorena I. (Mother) and Mother's two older children -- a girl, S., and S.'s older brother, S.I.<sup>2</sup> A., born in 2001, is the sole biological child of both Jesus and Mother.

### *A. Detention*

The family came to the attention of DCFS in November 2007, when S. was 12.<sup>3</sup> She accused Jesus of inappropriately touching her on three occasions in December 2006, approximately one year earlier. S. stated that on each of these occasions, Jesus came into the bedroom where she, A., and S.I. slept, and touched her vagina over her pajamas.<sup>4</sup> According to S., that behavior had not occurred since, but on one later occasion, S. had walked past the door of the bedroom used by Jesus and Mother, and observed Jesus watching pornography with his penis exposed. As a result of these incidents, S. did not feel comfortable around Jesus.

Mother denied that S. had reported the touching incidents. S. had told Mother about the pornography incident when it occurred and had said that

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<sup>1</sup> Jesus has two older sons, M.G. and D.G. M.G. is an adult and D.G., age 13, is not the subject of these proceedings.

<sup>2</sup> S.I. was named in the original petition along with S. and A. However, S.I. turned 18 prior to the adjudication and was not the subject of later proceedings.

<sup>3</sup> In 2003, there was an allegation of general neglect concerning S., that was investigated and determined to be unfounded.

<sup>4</sup> Each child had his/her own bed. A.'s was a trundle bed that pulled out from under S.'s.

Jesus quickly turned the channel when he saw her. After speaking to Jesus, Mother believed the pornography viewing was an isolated incident that would not happen again.

S.'s younger brother, A., and older brother, S.I., denied having experienced any abusive or inappropriate behavior.

The minors were detained and placed in the custody of Mother with the proviso that Jesus not be allowed to live in the home.<sup>5</sup>

### *B. Jurisdiction*

Prior to the jurisdictional hearing, the family was interviewed again. S. reiterated that Jesus had come into the small bedroom room she shared with A. and S.I., when they were in their separate beds asleep at night, and touched her on her "bottom half" (indicating her vagina and buttocks) a total of three times. During this interview, S. indicated she had seen Jesus's penis on multiple occasions. One of the occasions occurred when she was 10; she walked into the bedroom Jesus and Mother shared and saw Jesus naked either in the shower or in bed. She stated there were other occasions when the door was open as she walked past the bedroom and she saw him naked, but did not describe these occasions with specificity. After the interview, the caseworker concluded: "It does not appear . . . that [Jesus] deliberately called minor into the bathroom or bedroom when he had his genitals exposed," however, he "could have taken better action" by keeping the door closed.

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<sup>5</sup> Jesus was arrested shortly after S. reported the allegations and remained in custody during the proceedings. In January 2008, the court granted a restraining order to keep Jesus away from Mother and the children.

Interviewed again, Mother again denied knowledge of the touchings reported by S., and denied she had ever observed Jesus acting inappropriately with any of the children. Mother reported that S. did not like Jesus and was often angry about being subject to stricter rules than Jesus's children. Mother also reported that S. had been told not to use the adults' bathroom, but often did anyway.

A. and S.I. again denied that Jesus had behaved inappropriately towards them or that anyone had tried to touch their private parts.

At the March 2008 jurisdictional hearing, S. testified that Jesus had touched her three times in February and March 2006, while she was asleep and her brothers were sleeping in the same room. All of the touchings occurred under the blanket and over her pajama pants. On each occasion, she told him to stop and he left. The first time, he touched her vagina. On the second two occasions, he squeezed her buttocks. After the second time, S. persuaded A. to sleep in her bed. The third time Jesus touched S., A., four years old at the time, was in bed with her. A. did not wake up on that occasion; according to S., both her brothers slept through all three incidents. S. stated she had not spoken up earlier because she knew the family would suffer financial hardship and also because she was scared.

After the third touching incident, S. went to use the adults' bathroom and observed Jesus lying in bed with some kind of see through cover over him. Jesus called her over and gave her \$2. He said something about wanting to cover her or not being able to cover her, possibly referring to the three incidents.

Concerning whether she had seen Jesus exposed on other occasions, S. said that she and some of her friends had glimpsed him naked once when he was in the bathroom. On another occasion, S. and some of her cousins

saw Jesus's penis through a hole in his shorts while they were all watching television together. Asked whether she had seen Jesus naked "more than one other time," S. said yes. Asked to explain how it happened, she said: "I guess he'll be in the room watching pornography and he'll be wearing the shorts and his thing will be sticking out . . . of the hole." Counsel asked no follow-up questions to clarify her meaning.

Mother testified that S. did not have a good relationship with Jesus and wanted him and his son, D.G., who lived with the family for a period of time, out of the house. S. told Mother about the shorts incident and the pornography incident. Mother found a DVD that she suspected of pornographic content in the closet and threw it away. Jesus denied that it was what she thought it was and denied ever watching pornography. Mother's also threw away a pair of Jesus's shorts because of the presence of a hole near the zipper. After learning of S.'s accusations concerning the touching incidents, Mother confronted Jesus. He denied touching S.

Counsel for DCFS asked Mother about the family's emotional state since the allegations became known and Jesus was arrested. Mother testified that Jesus's arrest had made life difficult for the family and that A. especially had been adversely affected. The court sustained an objection to further questioning in this area, on the ground that A.'s reaction to his father's current situation was not relevant.

S.I., S.'s older brother, testified that he had never noticed anyone come into the bedroom at night. He further testified that Jesus never behaved inappropriately toward him and he never saw Jesus act inappropriately toward anyone else.

D.G., Jesus's son who had lived with the family for a period of time, testified that S. was openly antagonistic toward him and Jesus, and did not

want him and Jesus living with her. D.G. never observed Jesus behave inappropriately toward S., and he never saw Jesus naked.

After hearing the evidence, the court made the following factual findings: (1) “On or about February/March of 2006, [Jesus] sexually abused [S.] by fondling the child’s vagina and buttocks while [A.] was in the room. [¶] Further, [S.] is afraid of [Jesus] as a result of [his] sexual abuse of the child. [¶] Further, such ongoing sexual abuse by [Jesus] endangers the child’s physical and emotional health and safety, creates a detrimental home environment, placing [S. and A.] at substantial risk of abuse”; and (2) “On more than one occasion over the past two years, [Jesus] would watch pornography with his penis exposed and the bedroom door open while the children were in the home. Such inappropriate boundaries on [his] part place the children at substantial risk of serious emotional damage.”<sup>6</sup>

The petition alleged that jurisdiction was appropriate under Welfare and Institutions Code section 300, subdivision (b) (failure to protect); subdivision (d) (sexual abuse); and subdivision (j) (abuse of sibling). The court agreed that jurisdiction was supported under subdivisions (b), (d) and (j), as alleged in the petition. The court also concluded that jurisdiction was appropriate under subdivision (c) (serious emotional damage), and deemed the petition amended to “conform to proof.” Jesus appealed the jurisdictional order.

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<sup>6</sup> The court also found true allegations not relevant here -- that S.’s father failed to provide her with the necessities of life and that his whereabouts were unknown. The court did not find true allegations that Jesus fondled S.’s breasts or deliberately exposed his penis to her on the occasions that did not involve pornography.

Statutory references are to the Welfare and Institutions Code.

## DISCUSSION

On appeal, Jesus does not seek reversal of the juvenile court's factual findings concerning S., to whom he has no biological or legal relation. He contends that the factual allegations sustained by the court do not support assertion of jurisdiction over his biological son, A., and that the jurisdictional finding with respect to A. should be reversed. We agree.

### A. *Standard of Review*

Before asserting jurisdiction over a minor, the juvenile court must find that the child comes within one or more of the categories specified in section 300. (*In re Veronica G.* (2007) 157 Cal.App.4th 179, 185.) The burden is on DCFS to ““prove by a preponderance of the evidence that the child . . . comes under the juvenile court's jurisdiction.”” (*Ibid.*, quoting *In re Shelly J.* (1998) 68 Cal.App.4th 322, 329.) “On appeal from an order making jurisdictional findings, we must uphold the court's findings unless, after reviewing the entire record and resolving all conflicts in favor of the respondent and drawing all reasonable inferences in support of the judgment, we determine there is no substantial evidence to support the findings. [Citation.] Substantial evidence is evidence that is reasonable, credible, and of solid value.” (*In re Veronica G.*, *supra*, at p. 185.)

### B. *Finding that A. Was at Risk of Sexual Abuse*

After making the factual findings, the court found that jurisdiction over A. was warranted under section 300, subdivisions (b), (d) and (j), as alleged in the petition. Subdivision (d) applies where the child “has been sexually abused, or there is a substantial risk that the child will be sexually abused . . . by his or her parent or guardian or a member of his or her

household . . . .” A true finding that the minor is subject to a substantial risk of serious physical harm under subdivision (b) may be based on proof of sexual abuse or a serious risk of future sexual abuse. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824; *In re Alysha S.* (1996) 51 Cal.App.4th 393, 398 [“It may be inferred from the fact of a lewd touching that the victim suffered serious physical harm . . . .”].) A true finding under section 300, subdivision (j) requires proof that the child’s sibling has been abused or neglected as defined in one of the provisions of section 300 and that “there is a substantial risk that the child [under consideration] will be abused or neglected, as defined in those subdivisions.” The subdivision (b), (d) and (j) findings here were all based on Jesus’s sexual abuse of S. and the court’s concern that A. was at risk of sexual abuse.

In determining whether the abuse of one sibling is likely to be followed by the abuse of another, section 300, subdivision (j), expressly requires the court to “consider the circumstances surrounding the abuse or neglect of the sibling,” including “the age and gender of each child” and “the nature of the abuse or neglect of the sibling.” Here, the only victim of Jesus’s actions was S., A.’s 12 year old half-sister, who suffered multiple improper touchings in 2006 and observed Jesus watching pornography. There was no evidence that A., or any other child to whom Jesus had access, had been subject to sexual abuse or inappropriate behavior of any kind.

Courts have reached varying conclusions when faced with the issue whether a finding that one child has been sexually abused can, without more, justify a true finding that a sibling of a different gender is at substantial risk of molestation. (See Wilson, *The Cradle of Abuse: Evaluating the Danger Posed by a Sexually Predatory Parent to the Victim’s Siblings* (2002) 51 Emory L.J. 241, 263-266 [discussing studies showing that the majority of



fathers who sexually abuse daughters do not abuse male siblings].) In *In re Rubisela E.* (2000) 85 Cal.App.4th 177, the court reversed a jurisdictional finding that the three younger brothers of the 13-year old female victim of sexual abuse were at risk of similar abuse. The father had asked the victim to perform a sexual act and had touched her on multiple occasions, but there was no evidence of any suspicious behavior toward the boys and no evidence of any homosexual actions or tendencies on the part of the father. Based on this record, the court concluded DCFS had failed to meet its burden of proof under section 300, as there had been “no demonstration by [DCFS] that ‘there is a substantial risk [to the brothers] that [they] will be abused or neglected, as defined in . . . [the applicable] subdivisions.’” (85 Cal.App.4th at pp. 198-199, quoting *In re Edward C.* (1981) 126 Cal.App.3d 193, 198-199.)

The outcome was different in *In re Karen R.* (2001) 95 Cal.App.4th 84, where the victim had been raped by her father and humiliated and physically brutalized by both parents when she attempted to expose her father’s sexual advances. The court concluded that “a father who has committed two incidents of forcible incestuous rape of his minor daughter reasonably can be said to be so sexually aberrant that both male and female siblings of the victim are at substantial risk of sexual abuse within the meaning of section 300, subdivision (d), if left in the home” and “the juvenile court reasonably could conclude every minor in the home, regardless of gender, was in substantial danger of sexual abuse by father.” (*In re Karen R.*, at pp. 90-91.)

In *In re P.A.* (2006) 144 Cal.App.4th 1339, the court upheld a finding of jurisdiction over male children, where the evidence established only that the father twice improperly touched his 9-year old daughter. The juvenile

court had concluded that the two younger boys in the household were at risk because they were approaching the age of the victim and the father had access to them. (*Id.* at p. 1345.) The court of appeal affirmed, persuaded that “where, as here, a child has been sexually abused, any younger sibling who is approaching the age at which the child was abused, may be found to be at risk of sexual abuse.” (*Id.* at p. 1347.) The court found support for its determination in section 355.1, subdivision (d), which provides in pertinent part: “(d) Where the court finds that either a parent, a guardian, or any other person who resides with . . . a minor who is currently the subject of the petition filed under Section 300 . . . (3) has been found in a prior dependency hearing . . . to have committed an act of sexual abuse, . . . that finding shall be prima facie evidence in any proceeding that the subject minor is a person described by subdivision (a), (b), (c), or (d) of Section 300 and is at substantial risk of abuse or neglect. The prima facie evidence constitutes a presumption affecting the burden of producing evidence.” Acknowledging that section 355.1, subdivision (d), had not been triggered “because there was no prior dependency proceeding at the time of the [underlying] jurisdictional hearing,” the court nonetheless concluded that the provision “evinces a legislative determination that siblings of sexually abused children are at substantial risk of harm and are entitled to protection by the juvenile courts.” (*In re P.A.*, *supra*, 144 Cal.App.4th at p. 1347.)

Unlike the court in *In re P.A.*, we see nothing in the language of section 355.1 to suggest that the Legislature intended to lighten DCFS’s burden under section 300. Section 355.1 creates a presumption of risk, but applies only where there the parent has been found in a prior dependency hearing to have committed sexual abuse. Had the Legislature intended to create a presumption relieving DCFS’s of its usual burden under section 300

in other situations, it easily could have amended section 300 to say so. In the absence of a clear legislative intent to permit a presumption of sibling abuse to arise, we must hold DCFS to its evidentiary burden.

We agree that there may be situations where the perpetrator's conduct is so outrageous and aberrant that it evinces a disregard for the well-being of any and all children in the household. (*In re Karen R.*, *supra*, 95 Cal.App.4th at pp. 90-91.) We do not, however, believe that this is such a case. DCFS presented evidence that Jesus inappropriately touched S., his girlfriend's daughter, and either deliberately or inadvertently watched pornography in her presence. The juvenile court was asked to conclude from that evidence alone that A. was at substantial risk of sexual abuse. DCFS presented no evidence that Jesus had ever acted inappropriately toward A., any biological child, or any male child. To the contrary, the only pertinent evidence supported Jesus's position that he was not a danger to his young son. According to uncontroverted evidence, S.'s brothers D.G. and S.I. had lived in the same household as Jesus and were accessible to Jesus when they were S.'s age. Both were questioned by the caseworker on multiple occasions and both testified in court. Neither had been subject to any inappropriate behavior on Jesus's part.

Jurisdiction cannot be based on a "possible harm[]" that *could* come to pass" or on harm that is "merely speculative." (*In re David M.* (2005) 134 Cal.App.4th 822, 830.) Although substantial evidence may consist of inferences, such inferences "must be "a product of logic and reason" and "must rest on the evidence" [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding.'" (*In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1393-1394, italics omitted.) In view of the evidence that Jesus posed no threat to any male child, the finding of

jurisdiction over A. under section 300, subdivisions (b), (d) and (j) cannot be upheld.

*C. Finding that A. Was at Risk for Emotional Injury*

The petition did not allege jurisdiction under section 300, subdivision (c). The juvenile court concluded, however, that jurisdiction under that provision was warranted by the evidence presented at the jurisdictional hearing and added a subdivision (c) allegation to conform to proof. The evidence did not support the court's action.

Section 300, subdivision (c) applies where "[t]he child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian[,] or who has no parent or guardian capable of providing appropriate care." The statute thus permits intervention by the dependency system "when parental action or inaction causes . . . emotional harm," provided DCFS proves: "(1) the offending parental conduct; (2) causation; and (3) serious emotional harm or the risk thereof, as evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior." (*In re Alexander K.* (1993) 14 Cal.App.4th 549, 557.)

The petition did not allege -- and DCFS presented no evidence at the jurisdictional hearing -- that A. was suffering severe emotional harm. During cross-examination of Mother, DCFS's attorney asked whether A. was currently suffering emotionally due to the investigation and Jesus's absence, but the court halted the questioning, deeming any such evidence irrelevant. Respondent attempts to revive this issue, contending in its brief that the evidence of A.'s emotional distress in the aftermath of Jesus's arrest

and incarceration supports the jurisdictional finding under subdivision (c). We agree with the juvenile court that such evidence is irrelevant. That children suffer when a parent's improper actions are brought to light by the legal system we have no doubt, but such suffering cannot establish the parental culpability and causation required to establish dependency jurisdiction.

In any event, the juvenile court did not base its finding of jurisdiction under subdivision (c) on Jesus's abuse of S. and his subsequent arrest. The court found that A. was at risk of serious emotional damage based on the evidence of Jesus viewing pornography in the home. The court believed the evidence established that "on more than one occasion over the past two years" Jesus "watch[ed] pornography with his penis exposed and the bedroom door open while the children were in the home." The finding, however, was not supported by substantial evidence. According to S.'s testimony and the other evidence contained in the reports, Jesus negligently exposed himself to S. and her friends/cousins once or twice and once viewed pornography without adequately securing his privacy. Concerning the latter incident, there was no evidence that anyone but S. was aware of it or that any other child was at home at the time. The court's finding of multiple occasions was apparently based on S.'s description of seeing Jesus watching pornography in his bedroom with his penis exposed, which followed her statement that she had seen Jesus naked "more than [once]." Neither DCFS's attorney nor any other attorney present clarified whether "more than [once]" referred to seeing Jesus naked -- the bathroom and television incidents S. had just described -- or to seeing Jesus watch pornography. In view of S.'s statements to the caseworker and Mother prior to the hearing

that the pornography viewing happened only once, the court's interpretation of S.'s ambiguous testimony was not reasonable.

If the evidence established that Jesus had deliberately watched pornography and masturbated in front of the children we would agree that a finding under subdivision (c) would have been appropriate. However, there was no evidence that such outrageous behavior occurred. The evidence was of a single incident of pornography viewing behind an inadequately closed door that had not been noticed by any child in the home except S. The court's jurisdictional finding that A. was at risk of serious emotional damage for purposes of subdivision (c) because of this incident was not supported. (See *In re Ricardo L.* (2003) 109 Cal.App.4th 552, 565 ["[P]revious acts of neglect, standing alone, do not establish a substantial risk of harm; there must be some reason beyond mere speculation to believe they will reoccur. [Citations.]"]; *In re Rocco M. supra*, 1 Cal.App.4th at p. 824, ["While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm. [Citations.]"].)

### **DISPOSITION**

The jurisdictional order is reversed with respect to Jesus's biological son A., only.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.